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Second Evaluation Round

Evaluation Report on Germany

Adopted by GRECO
at its 24th Plenary Meeting
(Strasbourg, 27 June -1 July 2005)

I. INTRODUCTION

1. Germany was the eighteenth GRECO member to be examined in the second Evaluation round. The GRECO evaluation team (hereafter referred to as the "GET") was composed of Mr Antoine MACDONNCHA, Advisory Counsel, Office of the Attorney General, Ireland; Mr William A. KEEFER, Assistant Commissioner, Office of Internal Affairs, Customs and Border Protection, United States and Mr Atle ROALDSØY, Senior Adviser, Police Department, Ministry of Justice, Norway. This GET, accompanied by two members of the Council of Europe Secretariat, visited Germany from 13 to 17 December 2004. Prior to the visit the GET experts were provided with replies to the Evaluation questionnaire (document Greco Eval II (2004) 10E) as well as copies of relevant legislation and other documentation.
2. The GET met with officials from the following governmental organisations:
 - a) in Berlin: Federal Ministry of Justice; Federal Ministry of Finance and two auditors of the Federal Office of Finance; Federal Ministry of the Interior : Sections dealing with Prevention of Corruption, Sponsoring and Public Tendering, Civil Service Law, Prevention of Money Laundering, Prevention of corruption in the Federal Border Police, BKA (Federal Criminal Police Office); Federal Ministry of Economics and Labour; Federal Ministry of Communications, Construction and Housing; Federation of the German Cities and Municipalities; Public Prosecution Office of Berlin; State Criminal Investigation Department of Berlin;
 - b) in Hanover: Ministry of the Interior of Lower Saxony; Public Prosecution Office of Hanover; General Public Prosecution Office of Celle; two chief judges of the Economic Crime Division at the Regional Court of Hildesheim;
 - c) in Hamburg: Ministry of the Interior of Hamburg and Department of Internal Investigations; Public Prosecution Office of Hamburg.

Moreover, the GET met with members of the following non-governmental institutions: University of Heidelberg, Compliance Officer of the Deutsche Bahn AG (German Railway), Federation of the German Industry, Chamber of Auditors, Association of the Employees of the Highest and Higher Federal Offices, Transparency International, Newspapers.

3. The 2nd Evaluation Round runs from 1st January 2003 to 31 December 2005. In accordance with Article 10.3 of the Statute of GRECO, the evaluation procedure deals with the following themes:
 - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 19 paragraph 3, 13 and 23 of the Convention;
 - **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);
 - **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.

Germany signed the Criminal Law Convention on Corruption on 27 January 1999, but has not ratified it as yet.

4. The present report was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the effectiveness of measures adopted by the German authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 3. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Germany in order to improve its level of compliance with the provisions under consideration.

II. THEME I – PROCEEDS OF CORRUPTION

a. **Description of the situation**

Confiscation and other deprivation of instrumentalities and proceeds of crime

5. In the German legal system, confiscation (*Einziehung*) and forfeiture (*Verfall*) are two distinct mechanisms used for the deprivation of instrumentalities and proceeds of crime respectively. Confiscation is in principle – i.e. with the exception of confiscation of dangerous objects – a sanction, the imposition of which is taken into account in the determination of the sanction for the offence committed by using the confiscated instrumentalities. Forfeiture, according to case-law, is a measure *sui generis* and in principle is not taken into account when determining the sanction for the crime. Confiscation or forfeiture orders may be issued with regard to any criminal offence, including corruption as provided for in the Criminal Law Convention on Corruption. These measures may also be imposed independently (*in rem*), i.e. without conviction of the perpetrator.
6. According to Section 73 of the Criminal Code (hereafter CC), proceeds of crime, or value thereof, are subject to forfeiture. They shall be exacted from the perpetrator, instigator or accomplice by virtue of a court order (Section 73 paragraph 1 and 73a). The forfeiture order shall be issued also with regard to indirect profits (“derived benefits”, Section 73 paragraph 2) generated by the criminal offence. Extended forfeiture is also allowed (Section 73d): the court shall decide so when specific circumstances lead to the conclusion that the objects or assets in question were acquired as a result of a criminal activity¹. Instrumentalities of crime and objects deriving from it, or their value, are subject to confiscation (Section 74, paragraph 1 and 74c(1)). Confiscation presupposes that the objects appertain to the perpetrator, instigator, or accomplice, or are dangerous.
7. The general rule is that provisions on forfeiture and confiscation can be applied also to third parties when the crime has been committed on behalf of the third party and for his/her benefit (Section 73 paragraph 3) or in cases where a third party has furnished the object used in the commission of the offence or otherwise has knowledge of the fact that the property he/she acquired derives from criminal activities (Section 73 paragraph 4).
8. The burden of proof in cases of confiscation and forfeiture can never be reversed. In this regard, due to the principle of presumption of innocence and to the right to property, the constitutional system in Germany does not allow for introducing a mere presumption that objects have been acquired illegally. For this reason, and also in the case of extended forfeiture, the judge has to be “*convinced*” that the objects have been acquired as a result of unlawful acts, or for the purpose of committing such acts.

¹ The extended forfeiture provisions are mostly applied in cases of offences, including active and passive bribery (Section 338 CC), committed by criminal organised groups, or persons with a “criminal lifestyle”, and where there is no explanation for the origin of the assets obtained by the person other than a criminal one.

9. The extent of what has been acquired and its value, as well as the amount of eventual claims for damages may be estimated (Section 73b). All objects and proceeds used for/obtained through a criminal offence shall be subject to a forfeiture/confiscation order without the possibility to deduct the expenditures related to the preparation/commission of the offence. As a general rule, the confiscated assets go to the State (Section 74e) unless claims for damage have been filed by victims of the offence, in which case the proceeds (or part of them) can be used to cover compensation.

Interim measures: seizure and attachment

10. Sections 111b to 111k of the Code of Criminal Procedure (hereafter CCP) regulate interim measures: seizure and attachment of instrumentalities and proceeds of crime. Pursuant to these provisions, seizure is possible to secure the recovery of proceeds obtained by the offender in respect of all types of offence, including corruption. Property may be secured to ensure the enforceability of a future judgement, including the forfeiture and confiscation of proceeds/instrumentalities resulting, even indirectly, from the commission of an offence (including offences of corruption). Objects may be secured by seizure “(...) if there are reasons for assuming that the conditions have been fulfilled for their forfeiture or confiscation” (Section 111b (1)). It is also provided that *in rem* attachment can be ordered to secure the execution of pecuniary claims as established by civil procedural law. Provisional measures may be ordered for a period of six months, which is extendible to nine months. After this period, a further extension is possible only if “cogent reasons” are provided.
11. Seizure and attachment orders are issued by a judge and, in certain specific circumstances (i.e. when there is a risk of the defendant’s property being disposed of due to delay) by the public prosecution office. The way in which seizure and attachment are ordered, executed and secured differs depending on the object seized (Section 111c). As for the management of seized property, the responsibility for protection against loss, devaluation or damage lies with the official carrying out the seizure and is subsequently passed to the authority with the right of disposal (public prosecution office or court). The way in which the seized objects are to be handled, both generally and depending on the type of object, as well as the way in which objects or sums of money are to be returned or paid out, is regulated in detail. Seized or attached objects which are subject to deterioration or substantial reduction in value may be sold even before the final court decision on the case. The same principle applies to objects the preservation, care or maintenance of which involve disproportionately high costs or particular difficulties.

Investigations concerning proceeds of crime

12. Some public prosecution offices have established specialised departments which carry out financial investigations (as separate from investigations in respect of the offence), apply for and execute orders or urgent measures necessary for provisionally securing assets, and provide further assistance until enforcement has been completed. In some offices (e.g. Baden-Württemberg), both investigations of the offence and the relevant financial investigations are carried out by one team of specialised personnel (the so-called integration model). North-Rhine/Westphalia and Lower Saxony have opted for combined forms of these two models, depending on the complexity of the investigation. In other *Länder* (e.g. Bavaria, Thuringia), contact persons have been appointed to provide support in specific financial investigations, including tracing proceeds of crime, or to conduct these investigations themselves. The *Länder* police forces and the Federal Criminal Police Office have also established special organisational units to deal with the securing and investigating of proceeds of crime. Baden-Württemberg, for

instance, has more than 120 police officers with special training as financial investigators/asset confiscators.

Statistics

13. In 2002, provisional seizure measures were carried out in 38 investigations relating to suspected corruption cases. The total amount of the resulting claims was calculated at approximately 43.5 million euros, half of which were secured provisionally. In 2003, provisional measures were taken in 57 investigations. The resulting total amount of claims was calculated at approximately 33 million euros, out of which approximately 29 million euros were secured provisionally.
14. Number of cases in which confiscation and forfeiture were adjudicated:

Table 1

Year	Confiscation and forfeiture (total number of cases)
2000	18,899
2001	19,111
2002	17,744
2003	18,092

Number of cases of corruption in which confiscation/forfeiture were adjudicated:

Table 2²

Year	Section 108e CC	Section 299 CC	Section 331 CC	Section 332 CC	Section 333 CC	Section 334 CC	Section 335 CC
	Bribery of members of parliament	Bribery in business transactions	Acceptance of an advantage	Taking a bribe	Granting an advantage	Offering a bribe	Especially serious cases of taking or offering a bribe
2000	-	1	4	11	1	6	2
2001	-	-	9	14	-	6	3
2002	-	1	18	21	1	7	4
2003			9	11		9	4

Money laundering

15. Section 261 of the CC deals with money laundering offences: corruption offences are predicate offences with the following exceptions: bribery of members of domestic, foreign and international assemblies, trading in influence, passive bribery of foreign public officials other than from EU member states, as well as active and passive bribery in the private sector. However, the German authorities stated that the process of transposition of the Criminal Law Convention on Corruption into domestic law is currently under way; as a consequence, the list of predicate offences will be brought into line with the Convention's requirements.
16. The Money Laundering Act obliges banks, financial service institutions/companies, insurance companies, real estate brokers, gambling casinos and other business persons to report any transaction that may reasonably be assumed to constitute money laundering (Section 11 (1)).

² The German authorities stated that this relatively low number of cases is a result of the fact that in the vast majority of cases involving confiscation/forfeiture it may not be necessary to reach a formal decision to confiscate or forfeit due to the fact that the person concerned signs a waiver. In addition, in case of defendants who have violated more than one law, final convictions are counted only under the most serious offence. The authorities also pointed out that the statistics include only data related to the territory of the Federal Republic of Germany prior to reunification, including West Berlin.

The same applies to financial authorities (Section 31b of the Fiscal Code). Lawyers, legal advisers, patent lawyers and notaries as well as qualified auditors, certified accountants, tax consultants and agents in tax matters are also obliged to report suspicious transactions except those based on information obtained in the course of the provision of legal advice or while representing their clients in courts. However, if these persons know that the client is deliberately taking advice for money laundering purposes, their obligation to report remains valid.

17. Suspicious transaction reports (STRs) are to be filed with the prosecuting authorities, and a copy of such reports is to be sent to the Central Agency for the Reporting of Suspicious Transactions within the Federal Criminal Police Office. The Central Agency acts as financial intelligence unit (FIU), i.e. collects and analyses (copies of) STRs, transmits information to the prosecuting authorities, carries out statistic analyses of STRs and prepares an annual report. The FIU may request information from other authorities, e.g. customs or foreign police forces. Generally, the findings obtained are always fed back to the persons and institutions concerned in order to facilitate the identification of suspicious transactions. Moreover, the FIU assists the Federal and Land police forces in preventing and prosecuting money laundering, and in doing so, cooperates with the financial intelligence units of foreign States.
18. Regarding statistics on investigations, prosecutions and convictions concerning the predicate offence of corruption, only figures relating to convictions for money laundering are available. They appear in the table below³:

Table 3

Year	Section 261 (1) CC money laundering; concealment of illegally obtained assets	Section 261 (2) CC money laundering; obtaining, holding and using illegal assets	Section 261(4) CC especially serious cases of money laundering	Section 261(5) CC reckless money laundering
	persons convicted	persons convicted	persons convicted	persons convicted
2000	65	1	2	14
2001	92	4	6	8
2002	110	17	18	14
2003	101	10	9	8

Mutual legal assistance: provisional measures and confiscation/forfeiture

19. As a general principle, the German prosecuting authorities can at any time and during any investigation or criminal proceedings request foreign States for legal assistance. In individual cases, the results of the request depend on whether legal assistance is governed by an international treaty between Germany and the requested State or solely by the domestic law of the foreign State concerned. Pursuant to Section 67 of the German Law on International Judicial Assistance in Criminal Matters, objects that might be subject to surrender to a foreign State may be seized or otherwise secured even before the request for surrender has been submitted to Germany. A search may also be conducted for that purpose. Property that might serve as evidence in proceedings abroad, or which the person concerned has acquired as a result of the offence giving rise to the request, may be surrendered at the request of a competent authority of a foreign State if the applicable requirements have been met. Germany can also provide legal assistance by enforcing a sentence or other sanction imposed abroad with final and binding force

³ The authorities pointed out that the statistics include only data related to the territory of the Federal Republic of Germany prior to reunification, including West Berlin.

in accordance with Section 48 of the above Law, which covers, *inter alia*, forfeiture and confiscation orders.

b. Analysis

20. Germany has in place a comprehensive legal framework concerning both provisional measures (seizure and attachment) and confiscation of instrumentalities (*Einziehung*) as well as forfeiture of proceeds of crime (*Verfall*). A set of detailed provisions, contained in the Criminal Code and in the Code of Criminal Procedure, provides the law enforcement agencies with the necessary legal tools to make possible seizure and/or forfeiture of all the defendant's assets and/or deprive him/her of anything that was used in the commission of the offence. Forfeiture of proceeds of crime is compulsory in the event that a conviction is obtained and that certain criteria are met. Value forfeiture and *in rem* forfeiture are possible under German law and the confiscation of instrumentalities and forfeiture of proceeds found in the possession of a third party is also addressed. Section 73d of the Criminal Code deals with extended forfeiture and states that a court shall issue a forfeiture order with regard to "objects" of the defendant "if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts". The GET was informed that this specific form of forfeiture is only applied in relation to certain serious offences, which in any event include corruption. All the aforementioned measures can be applied in cases of corruption offences.
21. As regards the application of the instruments provided by law with regard to seizure/forfeiture, the GET was told (both by representatives of the Ministry of Justice and by the police officers and prosecutors met during the visit) that the general principle according to which all proceeds deriving from a crime, including corruption offences, can be seized/forfeited is regularly applied, also with regard to the defendant's relatives and/or third parties to whom those assets have been transferred. During the visit, the GET met with representatives of public prosecution offices and police officers from Berlin, Hanover and Hamburg, all of them working in specialised organised/economic crime units. The general impression of the GET is that the level of expertise and knowledge of, and the training provided to, staff working in the specialised law enforcement agencies in matters related to proceeds of crime is of a high standard.
22. During the visit, the GET was also provided with information concerning different concrete cases where provisional measures (seizure and attachment) and confiscation of instrumentalities/forfeiture of proceeds of crime had been applied. The great majority of those examples were related to investigative activities carried out in some *Länder* in the western part of Germany. Prior to the visit, the German authorities provided the GET with some statistics (see paragraph 14 above) on cases of confiscation/forfeiture adjudicated. They also explained that these statistics only relate to the territory of the Federal Republic of Germany, prior to reunification, and that there are no statistics available with regard to the territory of the former German Democratic Republic. The information gathered by the GET suggests that certain *Länder* are more active than others in making full use of the (complete) set of legal tools provided by German law to facilitate the forfeiture of proceeds of corruption. Moreover, the lack of comprehensive statistical data especially regarding the number of cases and the value of confiscated/forfeited property related to corruption in the overall territory of Germany makes it difficult to obtain an accurate idea of the effectiveness of the existing legislation and the efforts made in practice by law enforcement agencies to seize/forfeit assets obtained unlawfully as a result of corruption. Therefore, *the GET observes that comprehensive data on corruption cases in which forfeiture orders have been issued, as well as on the value of the assets forfeited in those cases should be collected and analysed.*

23. The GET noted that in many *Länder* specialised units of public prosecution offices and police have been set up in the area of economic and organised crime, including corruption. This system allows for the tracing of the proceeds or benefits of criminal acts on the grounds of reasonable suspicion at an early stage of the investigations. The GET also noted with satisfaction that there is close co-operation between banks, anti-money laundering agencies, the police and prosecution authorities. Banks and financial institutions appear to submit records and vouchers of the relevant transactions on a routine basis and in a timely manner. That said, the role of the tax authorities within anti-corruption operational activities could well be strengthened. In particular, the GET was told by prosecutors specialised in economic crime that they preferred not to request information from the tax authorities but to rather address their requests to banks and other financial institutions, which were said to be more reliable and swift in providing all required information. *The GET observes that in order to make the prosecutors' investigative work successful in recovering proceeds of corruption, seizing and, subsequently, restricting the defendant's benefits, all the entities and offices with an obligation to cooperate in the prevention of corruption and money laundering, and in particular the tax authorities, should provide a rapid response to all requests from the investigative authorities.* The GET's concern with regard to the interaction and collaboration between the tax authorities and the competent law enforcement agencies, is also examined below in paragraph 72.

III. THEME II – PUBLIC ADMINISTRATION AND CORRUPTION

a. Description of the situation

Definitions and legal framework

24. The federal constitution or “Basic Law” (*Grundgesetz*) of Germany specifies that the executive branch shall be bound by law and justice.⁴ There is no legal definition of the term “public administration”, which is commonly understood as the group of decision-making bodies regulated under public law. The “Framework Act on the Law Applicable to Civil Servants” (*Beamtenrechtsrahmengesetz*, hereafter BRRG), which provides for the statutory framework for civil servants at *Länder* level, together with the corresponding laws of the *Länder*, and the “Federal Civil Service Act” (*Bundesbeamtengesetz*, hereafter BBG), which is applicable at federal level, lay out the regulatory basis for civil servants in the public service. The general principles of administrative procedure law have been defined in the Administrative Procedures Act (*VwVfG*) at federal level; each of the 16 *Länder* has also adopted similar legislation, which either closely follows federal legislation or directly refers to it.

Anti-Corruption Policy

25. Germany has put in place various legal and institutional instruments, of both a preventive and repressive nature, to fight corruption at the different administrative levels. At Federal level, the Federal Government Directive concerning the Prevention of Corruption in the Federal Administration (hereafter the Federal Directive) adopted on 30 July 2004 (which repealed the previous Directive of 17 June 1998 with effect from 11 August 2004) establishes the legal framework to enact the Federal Government's prevention of corruption strategy, including an anti-corruption Code of Conduct (Annex I of the Directive) and concrete Guidelines for Supervisors and Heads of Public Authorities/Agencies (Annex II of the Directive). These regulations are supplemented by non-binding recommendations for implementing the Federal Directive. Similarly, the 2003 General Administrative Regulation to Promote Activities by the

⁴ Chapter II, Article 20, paragraph 3, Basic Law of the Federal Republic of Germany.

Federal Government through Contributions from the Private Sector (Sponsoring, Donations and Other Benefits) contains detailed rules on acceptance of private sponsorship by public authorities when fulfilling their duties. In addition to the aforementioned texts, the Federal Government has introduced a series of measures to modernise public administration, reduce bureaucracy and enhance transparency, e.g., by opening up its public information system via the Internet (e-government initiative "BundOnline 2005"), by electronically centralising procurement procedures in the federal administration through the Procurement Agency at the Federal Ministry of the Interior, etc.

26. At Länder level, the Programme for Preventing and Fighting Corruption, approved on 3 May 1996 by the Standing Conference of the Ministers of the Interior, includes a total of 16 guiding principles and 18 recommendations on preventive and repressive measures to counteract corruption, along with an information exchange system based on the reports provided by the different *Länder* on the implementation status of the recommendations⁵. Moreover, most of the *Länder* have now drawn up binding codes of conduct, have set up anti-corruption working groups, and are providing public information via advisory centres for citizens and employees in public administration, as well as Internet services that in some instances allow for anonymous reporting of corruption cases (e.g., North Rhine-Westphalia⁶, Hamburg and Lower Saxony). At municipal level, significant joint efforts have been made including the introduction of a Catalogue of 10 Points agreed by the German Association of Towns and Municipalities and the brochure on Preventing Manipulation, Fighting Corruption in Public Tendering produced with the Federal Association of Small and Medium-Sized Building Contractors.

Transparency

27. General information on the operation of public administration is publicly accessible via Internet and regular publications. These include, for example, the annual reports on corruption produced by the vast majority of *Länder* and by the Federal Office of Criminal Police, or the biannual report from the Federal Ministry of the Interior to the Bundestag and the general public on accepted private sponsorship, which is to be released from 2005. As from April 2005, the Bundestag will also be informed annually of the results obtained in the field of prevention of corruption in the Federal Government⁷.
28. As regards specific information on administrative procedures, the general principle laid down in Section 29 of the Administrative Procedures Act is that access to information is only available to those who have a legal interest in the relevant administrative procedure. Nevertheless, exceptions may apply in certain cases where the applicant, even if not personally affected by a specific administrative procedure, has nevertheless a personal/legal interest which gives him the right to either consult the relevant file (law on civil status, property rights, law on land registers) or have access to information (law on data protection and registration). Certain registers are freely accessible (commercial register, register of associations and marital property register). Further rights to access public information exist under the laws on environmental information (everyone has the right to access information) and on Stasi documentation (those affected have the right to inspect their files). Certain *Länder* (Berlin, Brandenburg, North-Rhine Westphalia and Schleswig-

⁵ There has been a total of three Implementation Reports to date, which were compiled in 1997, 1999 and 2002.

⁶ On 16 December 2004, the First Law on Fighting Corruption was adopted by the North-Rhine Westphalian Parliament. It entered into force on 1 March 2005.

⁷ After the visit, the GET was informed that the first annual report on corruption was submitted to and adopted by Parliament on 17 June 2005. The next report devoted to the prevention of corruption would deal with, *inter alia*, job rotation, identification of areas of public administration especially vulnerable to corruption, control and supervision, training and acceptance of gifts.

Holstein) have adopted legislation enabling public access to information on administrative procedures without the need to invoke any legitimate interest; refusal from a public authority to grant such access for specific reasons must always be justified. In addition, the Länder have specific competence with regard to media law and have granted special rights of access to information to journalists⁸.

29. German legislation provides for public hearings in particular for those projects affected by planning law. Section 73 of the Administrative Procedures Act constitutes the general legal framework for undertaking public consultation, which applies to all proceedings unless otherwise regulated under specific legislation.
30. Any person whose rights are affected by an administrative decision may file a complaint with the authority that made the decision. The relevant authority has a possibility to change its own decision, in which case the complaint will not result in any further action, or it may still wish to maintain its initial decision, in which case it must pass the case on to the corresponding hierarchically higher body. The decision of that body may then be appealed before administrative courts.

Control of Public Administration – “Contact person for corruption prevention”

31. The Federal Directive lays down the legal basis for so-called “contact persons for corruption prevention” in public agencies. All public officials⁹ (“Beschäftigte im öffentlichen Dienst”) as well as members of the public may refer to contact persons without having to go through official channels. If the contact person learns about facts leading to a reasonable suspicion of corruption, he/she shall inform the administrative organisation management, which is empowered to initiate formal internal investigations to clarify the reported facts. According to Point 5.3 of the Federal Directive, “contact persons shall not be delegated any authority to carry out disciplinary measures ; they shall not lead investigations in disciplinary proceedings for corruption cases”. Contact persons may submit “(...) proposals to office management on internal investigations, on anti-collusion measures and on informing the public prosecutor’s office upon suspicions of corruption”. Contact persons have been established within every federal ministry and other supreme federal authorities. One contact person may be responsible for more than one agency. At the time of the visit, nearly all federal governmental agencies had established contact persons within their organisations. Starting from 2005, the Federal Ministry of the Interior will collect annual statistics on reported cases of reasonable suspicions of corruption. These statistics will be included in the aforementioned annual report to the Bundestag (see footnote 7). Some *Länder* and municipalities also benefit from “external contact persons”, who are normally lawyers and are thus able to guarantee the anonymity of the informant on the basis of professional secrecy.

Recruitment, career and preventive measures

32. The principle of “selection of the best and most suitable candidate” is commonly applied when recruiting public officials. In general, vacancies are publicly advertised and a selection process follows on the basis of the aforementioned principle. Screening of personal records takes place and includes recourse to the data gathered by the Federal Central Register, the authority responsible for the administration of an extensive database of all convictions of German citizens by German and foreign courts. The Federal Government Directive concerning the Prevention of Corruption in the Federal Administration specifies that those public officials serving in areas of

⁸ The Draft Freedom of Information Act has been adopted by the German *Bundestag*; the draft still needs to be considered by the *Bundesrat*.

⁹ This term includes civil servants (“Beamte”) and employees in the Civil Service (“Angestellte und Arbeiter”).

activity especially vulnerable to corruption are to be selected with particular care; similar requirements are provided for in *Länder* legislation¹⁰.

Training

33. Training on the basic principles of public functions is provided both at university and technical colleges, and through internal courses provided by the public administration. Special training programmes in the field of prevention of corruption are also organised. As an example, the Federal Academy for Public Administration and the training institutions of the German Border Police and the Federal Armed Forces (*Bundeswehr*) provide advanced training on the fight against corruption, notably by organising different seminars. Particular emphasis is placed on further training of those officials whose areas of activity are particularly sensitive to corruption or who hold supervisory and managerial responsibilities. Additionally, special training programmes are organised by the Federal Ministry of the Interior for contact persons for the prevention of corruption at the supreme federal governmental level twice a year.

Conflicts of interest

34. According to Sections 65 of the BBG and 42 of the BRRG, a civil servant may only engage in additional employment to a limited extent if s/he fulfils two conditions: (1) the external employment does not compromise official interests or the civil servant's impartiality and objectiveness; (2) an authorisation from a superior authority is granted. In addition, public officials must immediately report any circumstances that may bias their action when carrying out official duties or/and acting in administrative procedures. Similar, however stricter, rules apply to the members of the Federal Armed Forces. Exceptions to this general rule concern literary, academic, artistic or public speaking activities of which the superior authority only needs to be informed. The income from any additional employment must be reported in any case (before or immediately after the activity or, if regular, annually).
35. With regard to the rotation of staff, the Federal Directive determines that the length of staff assignments in areas especially vulnerable to corruption shall in principle not exceed a period of five years; if extensions are required, the reasons thereof shall be recorded, while other measures to prevent corruption shall be taken instead (e.g. by increasing the use of scrutiny, by working in/making decisions by teams or by exchanging tasks within organisational units). In line with the Programme for Preventing and Fighting Corruption of the Standing Conference of the Ministers of the Interior, the principle of rotation in areas that are sensitive to corruption is also set out in regulations applied by most *Länder*. Some of these stipulate that urgent official reasons which may represent an obstacle to staff rotation, must be documented, after a fixed time period.
36. Only retired or former civil servants benefiting from retirement pensions are subject to a statutory "prohibition on competition" in the private sector. Pursuant to Sections 42a BRRG and 69a BBG, they are obliged during a period of 3 to 5 years to report any employment they intend to engage in, whenever such employment is related to former duties performed during the last five years of civil service. There are no specific measures in place to control the phenomenon of non-retired civil servants moving to the private sector. However, the use of official and administrative knowledge, as far as it constitutes an official or private secret, which was confided to a person in his/her capacity as a civil servant, may be sanctioned with imprisonment up to five years or a fine, irrespective of whether the offender was still a civil servant at the time of disclosure of the

¹⁰ According to Bavaria's Directive on Fighting Corruption of 1 May 2004 and Saxony's Administrative Regulation on Corruption Prevention of 21 May 2002, particular attention must also be paid to the reliability of applicants when recruiting for positions in areas of public administration that are classified as sensitive to corruption.

information (Sections 39 BRRG and 61 (1) BBG in connection with the penalties provided for under Section 353b CC on violation of official secrecy, and of the special duty of secrecy, as well as Section 203 (2) CC on violation of private secrets).

Codes of conduct/ethics

37. Sections 52 *et seq.* BBG and 35 *et seq.* BRRG, together with the applicable legislation at *Länder* level, establish the duties and core values of civil service. Specific Codes of Conduct Against Corruption have been developed by the Federal Government¹¹ and some *Länder* (e.g., Lower Saxony, Brandenburg, Mecklenburg-Western Pomerania). Advanced training is provided to managers on the contents and further implementation of such codes. Infringement of the provisions of these codes may lead to disciplinary sanctions, including dismissal and withdrawal of retirement pensions.

Gifts

38. Public officials are generally prohibited, and civil servants even after their public status has been terminated, from accepting rewards and gifts in connection with their duties. Acceptance of gifts may only be authorised in exceptional cases (Sections 70 BBG and 43 BRRG). On 8 November 2004, a new administrative Regulation prohibiting acceptance of gratuities and gifts in the Federal Administration entered into force, repealing previous regulations from 1962, 1977 and 1981.

Reporting corruption

39. Public officials are generally obliged to report suspicions of corruption of which they learn in the course of performing their official duties.¹² This obligation is deemed to be part of the public official's general duty to advise and support their superiors (Sections 52, 55 BBG and 35, 37 BRRG for civil servants and other relevant regulations for employees). In some *Länder*, this obligation is explicitly stated in administrative regulations, such as the directives on corruption. A civil servant shall not contact law enforcement authorities directly; the higher hierarchical superior has to be informed and is under the obligation to immediately inform the public prosecution office. A civil servant who reports directly to the law enforcement authorities could in principle be subject to disciplinary procedures. As part of Germany's preparations to ratify the Civil Law Convention on Corruption (ETS 174), amendments to the relevant sections of the BBG and the BRRG are envisaged¹³, which would enable civil servants to directly report well-founded suspicions of corruption to the public prosecutor. Moreover, with respect to employees in the civil service there will be an amendment to Section 612a of the Civil Code, the essence of which is to exclude unfavourable measures when reporting a suspicion in good faith.
40. As already mentioned above, the Federal Directive contains precise provisions for establishing "contact persons for corruption prevention". According to Point 5.2 of the Directive "If the contact person becomes aware of facts leading to a reasonable suspicion that a corruption offence has been committed, he or she shall inform the agency management and make recommendations on conducting an internal investigation, on taking measures to prevent concealment and on informing the law enforcement authorities. The agency management shall take the necessary steps to deal with the matter."

¹¹ Annex I of Federal Government Directive concerning the Prevention of Corruption in the Federal Administration of 30 July 2004.

¹² Federal Court of Justice 4 May 2004 – 4 StR 49/04.

¹³ Draft amendments have been adopted by the Cabinet of the Government.

Disciplinary proceedings

41. There are no special investigative bodies entitled to carry out disciplinary inquiries on misconduct/corruption by civil servants. The higher hierarchical superior should commence all relevant investigations in line with the standard procedure established in the Federal Act on Disciplinary Proceedings¹⁴. The result of such investigations form the basis for both the issuing of a disciplinary order and for bringing an action before the administrative court depending on the severity of the offence committed. Disciplinary measures may be challenged before an administrative court, and the court's decisions may be appealed. Under the Federal Disciplinary Law, the federal government established an office dealing with disciplinary law that, *inter alia*, collates data transmitted by the individual federal ministries into annual statistics. The nature and number of cases of misconduct as well as the nature and total number of the decisions taken are included. Corruption offences are accounted for separately.
42. Disciplinary and criminal proceedings may not run in parallel if relating to the same matter. In such cases, disciplinary proceedings are to be suspended until the criminal proceedings have been concluded; the factual results of criminal proceedings are binding for the administrative procedure. If criminal and disciplinary procedures do not concern the same matter, the disciplinary procedures may not be abandoned with regard to the criminal aspects, ensuring that investigation of the latter is not delayed any further.

b. Analysis

43. As indicated in the descriptive part of the present report (paragraph 25), a revised Federal Directive concerning the Prevention of Corruption in the Federal Administration was adopted in July 2004. This comprehensive text contains a set of concrete preventive measures to be taken and includes both a detailed "Anti-Corruption Code of Conduct" and specific "Guidelines for supervisors and heads of public authorities/agencies". The Directive applies to all federal agencies, including the armed forces. According to the German authorities, an evaluation of the Directive's impact will be presented to the Bundestag in 2005¹⁵. The GET is of the opinion that the Directive has the potential to make a major contribution to the prevention of corruption in the Federal Public Administration agencies. However, due to the political and administrative structure of Germany, the Directive is limited by its jurisdiction and has no force in the *Länder* or municipal governments. Many of the *Länder* have comparable directives, and some of them have apparently taken determined action to prevent and detect corruption. Hamburg, for example, has established a Department of Internal Investigations, consisting of 54 staff members. The unit has investigative jurisdiction for all *Land* public officials, strong leadership and a clear mandate to combat corruption. The GET also acknowledged that a system of exchange of information has been created at the *Länder* level following the Programme for Preventing and Fighting Corruption (see paragraph 26 above). However, it remains true that each *Land* retains the authority to address corruption matters as it sees fit. In view of the above, *the GET observes that the German authorities should continue to enhance the coordination and dissemination of anti-corruption measures and initiatives at the Federal and Länder level in order to develop nationwide best practices.*
44. In Germany, there is no legal basis providing the public with a general right to access government information. Indeed, the Administrative Procedures Act generally restricts the

¹⁴ This standard procedure applies in the federal administration and in some of the *Länder*. Other *Länder* abide by earlier rules of disciplinary procedures. The majority, however, intend to introduce the aforementioned procedure.

¹⁵ See footnote 7.

public's access to most government information unless the information required is related to a specific administrative proceeding and the persons requiring the information own legal interests related to the proceeding. Section 29 of the Act provides that "the authority shall allow participants to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to enforce or defend their legal interests." Berlin and three other *Länder* have passed freedom of information laws. Berlin's "Law for the Promotion of Freedom of Information in the State of Berlin" establishes a general right to access government data and establishes a judicious balance between legitimate privacy concerns and access to public records. In the GET's opinion, transparency of government is a critical element in the prevention of and fight against corruption. The German authorities advised the GET that a freedom of information law is now being prepared for consideration by Parliament¹⁶. **The GET recommends to adopt appropriate freedom of information legislation and put in place administrative measures facilitating access to information by the public in accordance with such legislation.**

45. German legislation regarding conflicts of interest and incompatibility of functions is clear and generally restrictive. Outside employment by public officials must be expressly authorised, and superiors have the authority to forbid even unpaid activity where a conflict of interest would arise. Retired civil servants must report any prospective employment that is linked to the past five years of their public employment. Officials who leave public service before they retire are under no post-employment restrictions so long as they do not use or disclose official secrets. However, the GET noted that there are no specific rules in place (beyond those mentioned in paragraph 37) that can be applied to public officials of all levels of public administration who move from the public to the private sector. The German authorities told the GET that there were no legal provisions to prevent former public officials from "capitalising on business relationships after switching to the private sector". The GET was of the impression that the German authorities' position on the issue of moving from public to private sector is that consideration is given only to the "fundamental right to take up employment" guaranteed under the Basic Law. In addition, a representative from the Association of Highest and Higher Federal Officers met by the GET stressed that very few public officials leave government service before retirement. This perception was echoed by other German officials. Nevertheless, **the GET recommends to introduce clear rules/guidelines for situations where public officials move to the private sector before they retire, in order to avoid conflicts of interest.**
46. German laws and regulations tightly regulate the issue of gifts to public officials as well as the phenomenon of "sponsoring", the donation of cash and non-cash contributions and services by the private sector to public sector entities for promotional purposes. In this respect, recently redrafted regulations provide that gifts valued more than 25 euros must be approved by a supervisor before they can be accepted, and all gifts must be reported. Some federal agencies prohibit the acceptance of any gifts. Sponsoring is an area of concern in Germany, and was mentioned by several authorities during the GET's visit. Comprehensive sponsoring regulations reviewed by the GET appear to establish both accountability and transparency. The acceptance of any sponsoring requires the written consent of the "highest administrative authority", and agencies are required to periodically report all sponsoring. In addition, sponsoring to federal agencies must be publicly disclosed. The German authorities advised the GET that the *Länder* have enacted analogous regulations regarding gifts.
47. The German legal system does not appear to provide for specific regulations to ensure that public officials who report suspicions of corruption in public administration in good faith are

¹⁶ See footnote 8.

adequately protected against possible retaliation. As mentioned in the descriptive part of the present report, specific provisions of the "Framework Act on the Law Applicable to Civil Servants" and of the "Federal Civil Service Act" require every civil servant to report allegations of misconduct, including corruption, to his/her immediate superior (and not directly to the law enforcement authorities). Failure to follow this obligation (to report only to the superior) may result in disciplinary action against the civil servant, even if the civil servant's allegations turn out to be well founded. The federal authorities and several *Länder* have developed and implemented a "contact person" procedure. Under this concept, a public official, as well as any other person, may report the allegation to a designated official within - and sometimes outside - the agency. The "Federal Government Directive concerning the Prevention of Corruption in the Federal Administration" establishes that if the contact person "becomes aware of facts leading to a reasonable suspicion that a corruption offence has been committed," he or she is required to "inform the agency management and make recommendations on conducting an internal investigation." The contact person "has the right to report directly to the head of the agency." The Directive makes clear, however, that it is only the agency head who "shall inform the public prosecutor's office and the highest service authority without delay" about possible corruption.

48. A number of *Länder* have similar provisions. In Lower Saxony, for example, contact persons are distributed throughout the *Land* agencies and allegations can be made anonymously through the *Land's* website. In Hamburg, corruption allegations can be reported to a private lawyer, who will forward the allegations to the police without revealing the identity of the person who provided the information. According to the Hamburg authorities met by the GET, this procedure enables preliminary investigations protecting the "whistle blower" from unjustified prejudice by colleagues or superiors and guaranteeing that his/her identity will be kept anonymous up to the trial.¹⁷ A representative of the German Association of Towns and Municipalities indicated that few contact persons had been designated in local government and suggested that there was no trend to change traditional reporting requirements. The Deutsche Bahn AG, the privatised railway service that retains approximately 50,000 public service employees has established a system of internal reporting/control where two lawyers ("ombudsmen") are empowered to receive and forward corruption allegations to the relevant law-enforcement agency. This reporting system allows the ombudsmen to withhold the identity of the public service employee who reports the allegation from the company and the police/prosecution. The GET was informed that these ombudsmen had received approximately 400 allegations, and that the prosecution services were examining about 150. During the visit, German authorities informed the GET that whistleblower legislation consistent with the Civil Law Convention on Corruption was being prepared for consideration by the Parliament¹⁸.
49. Numerous representatives of the Federal and *Länder* organisations met by the GET during the visit, both from the law enforcement agencies and from the institutions dealing with preparation of preventive policies/measures as well as from civil society, clearly expressed the opinion that the current German system founded on a hierarchical reporting requirement potentially slows the transmission of information about corrupt behaviour to the law enforcement agencies and increases the risk of leaks. Therefore, **the GET recommends to ensure that public officials, in addition to the existing system of reporting suspicions of corruption in public administration to the hierarchical superior or to the "contact persons for corruption prevention", have also the possibility to report suspicions of corruption directly to the competent law enforcement authorities – i.e. even without previously informing their superior.**

¹⁷ The GET was not in a position to determine whether this new anonymous reporting procedure had led to any corruption investigations by the police.

¹⁸ See footnote 13.

IV. THEME III – LEGAL PERSONS AND CORRUPTION

a. Description of the situation

Definition of legal persons

50. In Germany, legal persons under private law include registered associations (*eingetragener Verein*, eV), foundations and, above all, companies limited by shares (*Kapitalgesellschaften*). The latter comprise public limited companies (*Aktiengesellschaften*, AG), which are regulated by the Stock Corporation Act (AktG), partnerships limited by shares (*Kommanditgesellschaft auf Aktien*, KGaA), limited liability companies (GmbH), regulated by the Limited Liability Companies Act (GmbHG), and co-operative societies (eG), regulated by the Co-operative Societies Act (GenG).
51. The most important types of legal persons are public limited companies (AG) and limited liability companies (GmbH), which differ mainly in respect of the number of share holders (the minimum nominal capital in the AG is 50,000 EUR, while a GmbH is required to start with a minimum of 25,000 EUR) and of the procedures concerning decision-taking/management (AGs have more bodies involved in decision-making, including an annual general meeting, a management board and a supervisory board). There are no restrictions concerning the nationality of founding members or shareholders. Both types of company are liable for their business obligations vis-à-vis their creditors to the extent of the company's assets and fall under the relevant regulations applied to merchants ("*Formkaufmann*").

Registration and transparency measures

52. AGs and GmbHs need to fulfil some basic preconditions (e.g., specification of names of founders, type of shares, purpose of business, amount of initial capital, etc.) so that registration by the competent court can be effected. When registration occurs, such information is recorded in the commercial register (*Handelsregister*) and publicly disclosed, so that any third party can have access to it, without having to justify a legitimate or direct interest. The Stock Corporation Act provides for detailed regulations aimed at ensuring transparency with regard to business activities and structures, which shall also be recorded in the commercial register. Registered cooperative societies obtain legal capacity upon registration in the Register of Cooperative Societies, which is maintained at the Local Court. All applications for registration are subject to judicial review. Associations without an economic purpose are registered in the Register of Associations. Any person may have access to these two registers. There is no state register for foundations. Nevertheless, a majority of *Länder* have introduced an Index of Foundations based on *Land* law. Having a justified interest is a precondition for access to the Index of Foundations (except in some *Länder* where this precondition does not exist).

Limitations on exercising functions in legal persons

53. Persons who have been convicted for "bankruptcy" (Section 283, 283a CC), violation of the duty to keep books (Section 283b CC), preferential treatment for a creditor (Section 283c CC) or preferential treatment for a debtor (Section 283d CC) must be barred from occupying any managerial positions for a period of five years (Section 76 (3) sentence 3 of the Stock Corporation Act and Section 6 (2) sentence 3 of the Limited Liability Companies Act). A draft law is currently under consideration to extend the above-mentioned limitations to other types of economic offences, including fraud, breach of trust, and offences related to withholding or

embezzlement of wages or salaries (Sections 263 to 266 CC). Corruption and other related offences are not included in the list of offences for which a person acting in a leading position in legal persons can be disqualified.

Liability of legal persons

54. German legislation does not establish criminal liability of legal persons. However, both administrative and civil liability of legal persons for criminal offences exist. In particular, Sections 30 and 130 of the Law on Administrative/Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*, hereafter OWiG) allow to sanction administrative and criminal offences committed by legal persons through fines and apply also to corruption offences pursuant to the Criminal Code. Trading in influence is not punishable under German law. The OWiG applies not only to legal persons, but also to associations without legal capacity, as well as to all types of partnerships.
55. Legal entities may be held liable whenever a “person” in a leading position within the organisation - a list of such positions is contained in Section 30 (1) of the OWiG - has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity have been violated or the legal entity has effectively gained, or was supposed to have potentially gained, a profit. In addition, pursuant to Section 130 of the OWiG, the liability regime is also applicable whenever lack of supervision or control by a natural person in a leading position has occurred. It is possible to assign liability to the legal person even if no natural person has been convicted or identified, but it must be proved that a natural person within the leading structures of the organisation has either committed the offence or violated a supervisory duty.
56. Regarding the civil liability of legal persons, Sections 31 and 278 of the Civil Code apply whenever damages occur following an action of a natural person who holds a leading or managerial position within the business concerned; this also includes cases where a so-called “vicarious agent” (*Erfüllungsgehilfe*) exploits his/her position within the business to obtain a personal advantage.

Sanctions

57. Administrative fines may reach 1,000,000 euros for intentional criminal offences and 500,000 euros for negligent criminal offences. This limit may and should be exceeded in order to cover all the economic profit gained by the offender. Fines may be imposed on the legal person even if criminal or administrative proceedings have not been initiated in respect of the natural person who committed the offence, the procedure has been discontinued or if the natural person has not been convicted. According to jurisprudence of the Federal Supreme Court, institutional changes within a company cannot be used to circumvent the execution of the sanctions imposed. In addition to the pecuniary fines, sanctions such as the prohibition of engagement in a profession (Section 61 No. 6 and Section 70 CC) or the dissolution of a company in cases of endangerment of public welfare (Section 396 Stock Corporation Act) may exceptionally apply. Statistics relating to proceedings instituted against legal persons for corruption are not systematically collated at central level, although the Public Prosecution Offices of two *Länder* (Bavaria, North Rhine-Westphalia) have provided certain figures concerning levels of sanctions imposed until 2002. Those figures indicate that, in practice, most fines range from 20,000 to 175,000 Euros (most of the cases where these fines were applied concerned small and medium sized companies) and in some cases went up to 500,000 and – after September 2002 – 2 million Euros in a corruption case.

58. Although there have been several initiatives to establish a register of companies found liable for acts of corruption, none of these have succeeded yet at federal level. The Federal Government still pursues the adoption of a law to establish a central register; in this regard, a draft law was under consideration at the time of the visit. Several *Länder* (Bavaria, Berlin, North Rhine-Westphalia, Hesse, Baden-Württemberg, Rhineland-Palatinate, Hamburg, Lower Saxony and Bremen) have established their own registers; some other *Länder* are currently in the process of developing such records (Saarland, Brandenburg, Schleswig-Holstein). Furthermore, it is envisaged to establish a special procedure at federal level for awarding a “prequalification certificate” to those companies which have given proof of their expert know-how, reliability and performance in the context of previous contracts¹⁹. Only those companies which have declared *inter alia* that they are not recorded in a black-list at *Länder* level will be able to obtain such a prequalification certificate.

Tax deductibility and fiscal authorities

59. According to Section 4 (5), sentence 1, No. 10 of the Income Tax Act, expenditure for bribes and other illicit rewards are not deductible. Pursuant to sentence 2 of the same provision, courts, public prosecution offices or administrative authorities must report to the tax authorities any founded suspicion of corruption offences so that the tax authorities can act appropriately with regard to any possible fiscal consequences related to the corruption offence; the tax authorities have also an obligation to report suspicions of corruption to the law enforcement authorities. Access to tax records (which are not public) is to be granted to law enforcement bodies for criminal investigation purposes.

Accounting Rules

60. According to Section 257 of the Commercial Code, all “merchants” are obliged to maintain accounting records for a period of ten years (books of accounts, inventory documentation, procedural documentation and accounting vouchers) or six years (business correspondence). Commercial records are to be kept in a complete, correct, organised and timely manner (Section 239 (2) Commercial Code). Similar requirements are established under Section 147 of the Fiscal Code for tax-related purposes. Additionally, companies limited by shares are subject to stricter accounting obligations, which also require publication of their annual accounts in the Federal Gazette. Only registered associations which do not meet the requirements for being recognised as a “merchant” (non-profit organisations or small commercial enterprises) or do not fulfil the tax provisions under Section 141 of the Fiscal Code (basically, turnover not exceeding 350.000 EUR) may be exempted from the accounting obligations. The same exception applies to non-profit foundations under private law.
61. The use of false information in accounting documents is a punishable offence, according to the Commercial Code, which may be sanctioned with up to three years’ imprisonment or a fine. Improper accounting may also constitute a fiscal offence that may be punished with a fine. Furthermore, the Criminal Code establishes that failure to keep books of accounts as well as the destruction and hiding of accounting documents shall be punished with imprisonment of not more than two years or a fine in intentional cases, or with imprisonment of not more than one year or a fine in negligent cases. More severe sanctions apply to violations of the duty to keep books in cases of bankruptcy, including prison sentences that may range from five years to up to ten years. Incidentally, production of a counterfeit document, falsification of a document or utilisation

¹⁹ After the visit, the GET was informed that “an agreement on the prequalification system has been reached and the new system should be applicable by the end of 2005 at the latest”; guidelines on this system have been adopted on 25 April 2005.

of a counterfeit or falsified document constitute a crime under Section 267 of the Criminal Code, and are punishable with imprisonment of not more than five years or a fine. In addition, regarding legal persons which are obliged to have their accounting books examined, the auditor may refuse certification of annual accounts if the books have not been adequately kept (Section 322 (4) Commercial Code).

Role of accountants, auditors, and legal professionals

62. Accountants, auditors and/or other advising professionals are not obliged to report a suspicion based on information obtained in the course of the provision of legal advice or while representing their clients in court (see paragraph 16). However, if these persons know that their client is deliberately taking advice for money laundering purposes, their obligation to report suspicions of money laundering shall remain valid (Section 11 (3) Money Laundering Act). Furthermore, according to Section 321 (1) of the Commercial Code, auditors are obliged to report any “violation of statutory provisions” (including corruption and money laundering-related offences pursuant to Sections 261 and 331 et seq. of the Criminal Code) in their audit reports. False certification of annual accounts is a punishable offence according to Section 332 of the Commercial Code, which may be sanctioned with imprisonment of up to three years or a fine, and with imprisonment of up to five years or a fine if enrichment of the auditor, or another person, or to the detriment of others, has occurred or been intended as a result of such falsification.

b. Analysis

63. The GET is of the opinion that the system in place for the establishment and registration of public limited companies (*Aktiengesellschaft*, AG) and limited liability companies (GmbH), which are the most important legal persons in Germany, is adequate. The requirements for establishing such companies are clearly laid down in legislation (Stock Corporation Act, Company Law, Limited Liability Companies Act). As far as AG and GmbH are concerned, the system for registration in the commercial register, as well as access to information concerning these companies, appears to be well designed.
64. As already described above (paragraph 59), the question of whether or not to establish a system of debarment and “blacklisting” of legal persons involved in corrupt activities has been on the Federal Government’s agenda for several years. During the visit, the GET was told that a draft law establishing a central register of companies found liable for acts of corruption was under consideration. Representatives of the business sector met by the GET expressed strong support for such a register which would, *inter alia*, provide some protection to the large majority of companies in Germany which are not involved in corruption. Moreover, several *Länder* have their own registers of legal persons²⁰ found to be involved in corrupt activities and already use them when awarding public contracts. In this context, *the GET observes that a recommendation on this issue has already been addressed to Germany in GRECO’s First Evaluation Round Report²¹ and that this recommendation is still valid and subject to GRECO’s compliance procedure.*
65. Section 76 (3), third sentence, of the Stock Corporation Act provides that “A person convicted of a criminal offence pursuant to Sections 283 to 283d of the Criminal Code (Crimes of Insolvency) may not be a member of the management board for a period of five years (...)”. This rule also applies to limited liability companies. At the time of the evaluation, the German authorities

²⁰ In Hamburg and North Rhine-Westphalia, these registers are established by statute.

²¹ GRECO recommended “to better enforce the rules on public procurement, including in cases which fall below the threshold for EU-wide competition, and to adopt legislative measures to establish at Federal level a central register ('blacklist') of companies which have previously been found untrustworthy in bids for public contracts”.

reported that the Chamber of the Länder was preparing a draft law, which would extend the scope of application Section 76 (3) of the Stock Corporation Act by including offences such as fraud, computer fraud, subsidy fraud, capital investment fraud, breach of trust and withholding and embezzlement of wages or salaries. The offences of false information, false presentation and deliberate breach of duty in case of loss, excessive indebtedness or insolvency are also to be included. According to this draft, shareholders or managers of limited liability companies can also be barred if found guilty of making wilfully false statements related to the establishment of a company or in connection with the increase or decrease of the nominal capital of a company.

66. The GET takes note of the fact that the German authorities were contemplating, at the time of the visit, including new offences for which a person acting in a leading position in legal persons can be disqualified. It considers these draft amendments favourably as they appear to address, in an appropriate manner, the need for establishing further sanctions aimed, *inter alia*, at maintaining high standards of general trust in business activities. Nevertheless, the GET notes that none of the corruption offences under German legislation are included in the expanded list of new offences contained in the above mentioned draft law. The GET finds it difficult to identify any convincing reason for not including corruption offences. Rather, in the GET's view, the inclusion of corruption offences naturally follows from the rationale behind the debarment system. Therefore, **the GET recommends to introduce legal provisions establishing that a person who has been convicted for a corruption offence, at least those categorised as serious offences, can be disqualified from acting in a leading position in legal persons.**
67. The Law on Administrative/Regulatory Offences (hereinafter OWiG), Sections 17, 30 and 130, establishes the statutory basis for sanctioning legal persons for corruption offences. The Federal Government does not collect statistics on the use of these provisions. During the visit, representatives of the law enforcement agencies from Berlin, Hanover and Hamburg informed the GET that the OWiG had been applied in some corruption cases in these *Länder*, but they could not provide any statistics. The German authorities informed the GET that from 1994 to 2002, the Munich I Public Prosecution Office prosecuted 122 legal persons for corruption and that some other similar cases were prosecuted in three other *Länder*. In the absence of statistics presenting a clear picture on convictions and sanctions in respect of legal persons in Germany, the GET is not in a position to make an accurate assessment with regard to the frequency of application - and efficiency - of the OWiG. In the light of the information provided by the German authorities, both in the replies to the questionnaire and during the on-site visit, the GET gained the impression that the OWiG provisions applicable to legal persons are not used consistently. Therefore, **the GET recommends to examine the use of corporate sanctions with a view to identifying and remedying disparities in the application of the relevant provisions in the Law on Administrative/Regulatory Offences and, if appropriate, to issue guidelines for public prosecutors concerning a more uniform application of the law.**
68. Section 30 (2) of the OWiG states that “the regulatory fine shall amount 1) in the case of a criminal offence committed with intent, to not more than one million Euros; 2) in the case of a criminal offence committed negligently, to not more than five hundred thousand Euros.” In addition, Section 17 of the OWiG states that “The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from the commission of the regulatory offence”. This implies that the one million euros maximum fine provided for under in Section 30 (2) n° 1 can only be exceeded when a financial gain can be proved. The GET's understanding, therefore, is that even in serious cases where the financial benefit gained by legal persons involved in corrupt activity is difficult to calculate/prove, the applicable fine would be limited to a maximum of one million Euros. The serious and damaging nature of corruption cases, even when there is no proof of a financial benefit derived from the offence, should not be overlooked. Representatives of the

Public Prosecution Office of Berlin informed the GET that the one million Euros maximum fine had been exceeded in one case in Berlin and in a few others in other *Länder*. According to the information provided to the GET by the German authorities, there are no guidelines concerning the calculation of the financial benefit gained by a legal person as a result of committing a prohibited act. Nevertheless, the German authorities underlined that clearly established case-law exists on this issue. The amount of the monetary sanction to be applied pursuant to the OWiG is entirely left to the prosecutors' evaluation/discretion. Taking into account the size and financial strength of the German corporate sector, the GET is of the opinion that the current OWiG does not provide for sanctions which would be appropriate in certain situations (e.g. cases of serious corruption offences involving big companies). Therefore, **the GET recommends that the German authorities consider amending Section 30 (2) no. 1 of the Law on Administrative/Regulatory Offences with a view to ensuring that effective, proportionate and dissuasive pecuniary sanctions can be imposed on legal persons involved in corruption.**

69. Pursuant to Section 4 (5), sentence 1 no. 10 of the Income Tax Act, no payment, the making of which constitutes an offence (criminal or other), including bribes, is tax-deductible.
70. The destruction of books, the using of false or incomplete information in accounting documents as well as unlawfully omitting to record payments are all offences under German law. The GET considers the legislation in this regard to be in conformity with article 14 of the Criminal Law Convention on Corruption.
71. As far as the GET was able to assess during the visit, cooperation between the tax authorities and law enforcement agencies is quite well developed. During the visit, the GET was told that when tax inspectors have a (substantial) suspicion that a crime has been committed by a tax payer, they are obliged to inform the competent law enforcement or administrative authorities. The GET was provided with conflicting information regarding the obtaining of information - related notably to investigations of corruption offences not involving elements of fiscal offences - by the prosecution service from the tax authorities. On the one hand, the GET was told by representatives of law enforcement agencies that, in such cases, the prosecution authority would not have access to information stored by the tax authorities and had to rely on other more easily accessible sources of information (e.g. banking records and financial statements). On the other hand, the GET was informed that tax information could also be obtained pursuant to Section 30, Sub-section (4), numbers 4 and 5 of the Fiscal Code. Having examined the text of these provisions, it seems to the GET that tax secrecy does not prohibit the tax authorities from disclosing information to the prosecution service when it is of "compelling public interest". The concept of compelling public interest is defined, *inter alia*, by reference to "an economic offence which is being, or is to be, prosecuted and which, on account of its manner of commission or the extent of damage caused as a result of its commission, would cause considerable disruption to the economic order or could damage the general public's trust in the integrity of business transactions or the proper functioning of authorities and public institutions". This would appear to include corruption. However, the GET is still of the opinion that the text of Section 30 of the Fiscal Code gives rise to different interpretations. In view of the above, *the GET observes that guidelines for tax authorities and public prosecutors should be elaborated, clarifying the scope of the exemptions from tax secrecy that follow from Section 30 of the Fiscal Code, when prosecution services seek fiscal information from tax authorities in connection with corruption cases which do not involve fiscal offences.*
72. As mentioned in the descriptive part of the present report, private auditors do not have an obligation to report suspicions of corruption to the law enforcement bodies. Nevertheless, Section

11 (1) of the Money Laundering Act clearly states that those institutions, enterprises and persons listed in Section 3 of the same Act – including “qualified auditors, certified accountants, tax consultants and agents in tax matters” (Section 3 (1) n° 2) – when detecting “facts suggesting that a financial transaction serves the purpose of money laundering (...), or would serve this purpose if accomplished, shall report to the competent prosecution authorities and, by way of copy, to the Federal Criminal Police Office – Financial Intelligence Unit – (...)”. During the visit, the GET was told that guidelines on how to comply with the Anti-Money Laundering measures had been prepared and distributed to auditors. In addition, Article 321, Section 1 of the Commercial Code (“Auditing report”) stipulates : “(...) In addition the auditor must report any discovered incorrectness or violation of the law as well as any facts which may endanger the existence of the audited company or corporate group or may substantially harm its development or which reveal serious violations of the law, (...)”. During the visit, the GET was told that since the adoption of the Money Laundering Act, in August 2002, one suspicious transaction report had been filed by auditors. For that reason, *the GET observes that the German authorities should encourage the auditors’ representative bodies to issue directives and organise training on the detection and reporting of corruption.*

V. CONCLUSIONS

73. Germany has in place a comprehensive legal framework concerning both provisional measures (seizure and attachment) and confiscation of instrumentalities (*Einziehung*) as well as forfeiture of proceeds of crime (*Verfall*). A set of detailed provisions, contained in the Criminal Code and in the Code of Criminal Procedure, provides the law enforcement agencies with the necessary legal tools to make possible seizure and/or forfeiture of the defendant’s assets and/or deprive him/her of anything that was used in the commission of the offence. As regards the application of the instruments provided by law with regard to seizure/forfeiture, the general principle according to which all proceeds deriving from a crime, including corruption offences, can be seized/forfeited is regularly applied, also with regard to the defendant’s relatives and/or third parties to whom those assets have been transferred. Nevertheless, the information gathered show that certain *Länder* are more active than others in making full use of the set of legal tools provided by German law to facilitate the forfeiture of proceeds of corruption.
74. As far anti-corruption/integrity policies in public administration are concerned, the revised Federal Directive concerning the Prevention of Corruption in the Federal Administration is a comprehensive text that contains a set of concrete preventive measures to be taken and has the potential to make a major contribution to the prevention of corruption in the Federal Public Administration agencies. Public access to government information, the issue of civil servants moving to the private sector and the system of reporting suspicions of corruption in public administration are among the main areas which deserve a thorough debate which would help support the Government in its fight against corruption. As regards legal persons and corruption, the setting up of a system of debarment and “blacklisting” of legal persons involved in corrupt activities has been on the Federal Government’s agenda for several years and is more and more demanded, not least in order to protect the vast majority of German companies which are not involved in corruption. The issue of the effectiveness of measures/sanctions against both persons acting in a leading position in legal persons and against legal persons for committing serious offence of corruption needs also to be addressed by the German authorities.
75. In view of the above, GRECO addresses the following recommendations to Germany:

- i. to adopt appropriate freedom of information legislation and put in place administrative measures facilitating access to information by the public in accordance with such legislation (paragraph 44);
 - ii. to introduce clear rules/guidelines for situations where public officials move to the private sector before they retire, in order to avoid conflicts of interest (paragraph 45);
 - iii. to ensure that public officials, in addition to the existing system of reporting suspicions of corruption in public administration to the hierarchical superior or to the “contact persons for corruption prevention”, have also the possibility to report suspicions of corruption directly to the competent law enforcement authorities – i.e. even without previously informing their superior (paragraph 49);
 - iv. to introduce legal provisions establishing that a person who has been convicted for a corruption offence, at least those categorised as serious offences, can be disqualified from acting in a leading position in legal persons (paragraph 66);
 - v. to examine the use of corporate sanctions with a view to identifying and remedying disparities in the application of the relevant provisions in the Law on Administrative/Regulatory Offences and, if appropriate, to issue guidelines for public prosecutors concerning a more uniform application of the law (paragraph 67);
 - vi. to consider amending Section 30 (2) no. 1 of the Law on Administrative/Regulatory Offences with a view to ensuring that effective, proportionate and dissuasive pecuniary sanctions can be imposed on legal persons involved in corruption (paragraph 68).
76. Moreover, GRECO invites the German authorities to take account of the *observations* (paragraphs 22, 23, 43, 64, 71 and 72) in the analytical part of this report.
77. Finally, pursuant to Rule 30.2 of the Rules of procedure, GRECO invites the German authorities to present a report on the implementation of the above-mentioned recommendations by 31 December 2006.